

211.602

Subpart 211.6—Priorities and Allocations

211.602 General.

DoD implementation of the Defense Priorities and Allocations System is in DoDD 4400.1, Defense Production Act Programs.

[64 FR 51075, Sept. 21, 1999]

PART 212—ACQUISITION OF COMMERCIAL ITEMS

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AUTHORITY: 41 U.S.C. 421 and 48 CFR Chapter 1.

SOURCE: 60 FR 61595, Nov. 30, 1995, unless otherwise noted.

Subpart 212.1—Acquisition of Commercial Items—General

SOURCE: 73 FR 4114, Jan. 24, 2008, unless otherwise noted.

212.102 Applicability.

(a)(i) When using FAR Part 12 procedures for acquisitions exceeding \$1 million in value, the contracting officer shall—

(A) Determine in writing that the acquisition meets the commercial item definition in FAR 2.101; and

(B) Include the written determination in the contract file.

(ii) Follow the procedures at PGI 212.102(a) regarding file documentation.

Subpart 212.2—Special Requirements for the Acquisition of Commercial Items

212.207 Contract type.

b) In accordance with section 805 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110–181), use of time-and-materials and labor-hour contracts for the acquisition of commercial items is authorized only for the following:

(i) Services acquired for support of a commercial item, as described in paragraph (5) of the definition of *commercial item* at FAR 2.101 (41 U.S.C. 103).

(ii) Emergency repair services.

(iii) Any other commercial services only to the extent that the head of the agency concerned approves a written

determination by the contracting officer that—

(A) The services to be acquired are commercial services as defined in paragraph (6) of the definition of *commercial item* at FAR 2.101 (41 U.S.C. 103);

(B) If the services to be acquired are subject to FAR 15.403-1(c)(3)(ii), the offeror of the services has submitted sufficient information in accordance with that subsection;

(C) Such services are commonly sold to the general public through use of time-and-materials or labor-hour contracts; and

(D) The use of a time-and-materials or labor-hour contract type is in the best interest of the Government.

[74 FR 34264, July 15, 2009, as amended at 74 FR 35826, July 21, 2009; 76 FR 21812, Apr. 19, 2011; 76 FR 58136, Sept. 20, 2011]

212.211 Technical data.

The DoD policy for acquiring technical data for commercial items is at 227.7102.

212.212 Computer software.

(1) Departments and agencies shall identify and evaluate, at all stages of the acquisition process (including concept refinement, concept decision, and technology development), opportunities for the use of commercial computer software and other non-developmental software in accordance with Section 803 of the National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417).

(2) See Subpart 208.74 when acquiring commercial software or software maintenance. See 227.7202 for policy on the acquisition of commercial computer software and commercial computer software documentation.

[74 FR 34270, July 15, 2009]

212.270 Major weapon systems as commercial items.

The DoD policy for acquiring major weapon systems as commercial items is in Subpart 234.70.

[71 FR 58538, Oct. 4, 2006]

Subpart 212.3—Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items

212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

(f) The following additional provisions and clauses apply to DoD solicitations and contracts for the acquisition of commercial items. If the offeror has completed the provisions listed in paragraph (f)(i) or (ii) of this section electronically as part of its annual representations and certifications at <https://orca.bpn.gov>, the contracting officer may consider this information instead of requiring the offeror to complete these provisions for a particular solicitation.

(i) Use one of the following provisions as prescribed in part 225:

(A) 252.225-7000, Buy American Act—Balance of Payments Program Certificate.

(B) 252.225-7020, Trade Agreements Certificate.

(C) 252.225-7035, Buy American Act—Free Trade Agreements—Balance of Payments Program Certificate.

(ii) Use the provision at 252.212-7000, Offeror Representations and Certifications—Commercial Items, in all solicitations for commercial items exceeding the simplified acquisition threshold. If an exception to 10 U.S.C. 2410i applies to a solicitation exceeding the simplified acquisition threshold (see 225.7603), indicate on an addendum that “The certification in paragraph (b) of the provision at 252.212-7000 does not apply to this solicitation.”

(iii) Use the clause at 252.212-7001, Contract Terms and Conditions Required to Implement Statutes or Executive Orders Applicable to Defense Acquisitions of Commercial Items, in all solicitations and contracts for commercial items, completing paragraphs (a) and (b), as appropriate.

(iv) Use the provisions and clauses prescribed elsewhere in DFARS as follows:

(A) Use the provision at 252.204-7011, Alternative Line Item Structure, as prescribed in 204.7109(b).

(B) Use the provision at 252.209-7001, Disclosure of Ownership or Control by

the Government of a Terrorist Country, as prescribed in 209.104–70(a).

(C) Use the clause at 252.211–7003, Item Identification and Valuation, as prescribed in 211.274–4.

(D) Use the clause at 252.211–7006, Radio Frequency Identification, as prescribed in 211.275–3.

(E) Use the provision at 252.225–7010, Commercial Derivative Military Article—Specialty Metals Compliance Certificate, as prescribed in 225.7003–5(b).

(F) Use the clause at 252.225–7040, Contractor Personnel Authorized to Accompany U.S. Armed Forces Deployed Outside the United States, as prescribed in 225.7402–4.

(G) Use the clause at 252.225–7043, Antiterrorism/Force Protection Policy for Defense Contractors Outside the United States, in solicitations and contracts that include the clause at 252.225–7040.

(H) Use the clause at 252.232–7009, Mandatory Payment by Government-wide Commercial Purchase Card, as prescribed in 232.1110.

(I) Use the clause at 252.232–7010, Levies on Contract Payments, as prescribed in 232.7102.

(J) Use the clause at 252.232–7011, Payments in Support of Emergencies and Contingency Operations, as prescribed in 232.908.

(K) Use the clause at 252.246–7003, Notification of Potential Safety Issues, as prescribed in 246.371.

(L) Use the provision at 252.247–7026, Evaluation Preference for Use of Domestic Shipyards—Applicable to Acquisition of Carriage by Vessel for DoD Cargo in the Coastwise or Noncontiguous Trade, as prescribed in 247.574(e).]

(M) Use the clause at 252.247–7027, Riding Gang Member Requirements, as prescribed in 247.574(f).

(v) Use the clause at 252.232–7009, Mandatory Payment by Government-wide Commercial Purchase Card, as prescribed in 232.1110.

(vi) Use the clause at 252.211–7003, Item Identification, as prescribed at 211.274–4.

(vii) Use the clause at 252.225–7040, Contractor Personnel Authorized to Accompany U.S. Armed Forces Deployed Outside the United States, as prescribed in 225.7402–4.

(viii) Use the clause at 252.225–7043, Antiterrorism/Force Protection Policy for Defense Contractors Outside the United States, in solicitations and contracts that include the clause at 252.225–7040.

(ix) Use the clause at 252.211–7006, Radio Frequency Identification, as prescribed in 211.275–3.

(x) Use the clause at 252.232–7010, Levies on Contract Payments, as prescribed in 232.7102.

(xi) Use the clause at 252.246–7003, Notification of Potential Safety Issues, as prescribed in 246.371.

(xii) Use the provision at 252.247–7026, Evaluation Preference for Use of Domestic Shipyards—Applicable to Acquisition of Carriage by Vessel for DoD Cargo in the Coastwise or Noncontiguous Trade, as prescribed in 247.574(e).

(xiii) Use the provision at 252.225–7010, Commercial Derivative Military Article—Specialty Metals Compliance Certificate, as prescribed in 225.7003–5(b).

(xiv) Use the clause at 252.232–7011, Payments in Support of Emergencies and Contingency Operations, as prescribed in 232.908.

(xv) Use the clause at 252.247–7027, Riding Gang Member Requirements, as prescribed in 247.574(f).

[60 FR 61595, Nov. 30, 1995]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting section 212.301, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

212.302 Tailoring of provisions and clauses for the acquisition of commercial items.

(c) *Tailoring inconsistent with customary commercial practice.* The head of the contracting activity is the approval authority within the DoD for waivers under FAR 12.302(c).

Subpart 212.5—Applicability of Certain Laws to the Acquisition of Commercial Items

212.503 Applicability of certain laws to executive agency contracts for the acquisition of commercial items.

(a) The following laws are not applicable to contracts for the acquisition of commercial items:

- (i) 10 U.S.C. 2306(b), Prohibition on Contingent Fees.
- (ii) 10 U.S.C. 2324, Allowable Costs Under Defense Contracts.
- (iii) 10 U.S.C. 2384(b), Requirement to Identify Suppliers.
- (iv) 10 U.S.C. 2397(a)(1), Reports by Employees or Former Employees of Defense Contractors.
- (v) 10 U.S.C. 2397b(f), Limits on Employment for Former DoD Officials.
- (vi) 10 U.S.C. 2397c, Defense Contractor Requirements Concerning Former DoD Officials.
- (vii) 10 U.S.C. 2408(a), Prohibition on Persons Convicted of Defense Related Felonies.
- (viii) 10 U.S.C. 2410b, Contractor Inventory Accounting System Standards (see 252.242-7004).
- (ix) 107 Stat 1720 (Section 843(a), Public Law 103-160), Reporting Requirement Regarding Dealings with Terrorist Countries.
- (x) Domestic Content Restrictions in the National Defense Appropriations Acts for Fiscal Years 1996 and Subsequent Years, unless the restriction specifically applies to commercial items. For the restriction that specifically applies to commercial ball or roller bearings as end items, see 225.7019-2(b) (Section 8064 of Public Law 106-259).
- (xi) Section 8116 of the Defense Appropriations Act for Fiscal Year 2010 (Pub. L. 111-118) and similar sections in subsequent DoD appropriations acts.
- (c) The applicability of the following laws has been modified in regard to contracts for the acquisition of commercial items:
 - (i) 10 U.S.C. 2402, Prohibition on Limiting Subcontractor Direct Sales to the United States (see FAR 3.503 and 52.203-6).
 - (ii) 10 U.S.C. 2306a, Truth in Negotiations Act (see FAR 15.403-1(b)(3)).

[60 FR 61595, Nov. 30, 1995, as amended at 63 FR 11851, Mar. 11, 1998; 63 FR 55040, Oct. 14, 1998; 65 FR 77828, Dec. 13, 2000; 67 FR 4208, Jan. 29, 2002; 69 FR 65089, Nov. 10, 2004; 73 FR 76970, Dec. 18, 2008; 75 FR 27947, May 19, 2010; 76 FR 38047, June 29, 2011]

212.504 Applicability of certain laws to subcontracts for the acquisition of commercial items.

- (a) The following laws are not applicable to subcontracts at any tier for

the acquisition of commercial items or commercial components:

- (i) 10 U.S.C. 2306(b) Prohibition on Contingent Fees.
- (ii) 10 U.S.C. 2313(c), Examination of Records of a Contractor.
- (iv) 10 U.S.C. 2324, Allowable Costs Under Defense Contracts.
- (v) 10 U.S.C. 2327, Reporting Requirement Regarding Dealings with Terrorist Countries.
- (vi) 10 U.S.C. 2384(b), Requirement to Identify Suppliers.
- (vii) 10 U.S.C. 2391 note, Notification of Substantial Impact on Employment.
- (viii) 10 U.S.C. 2393, Prohibition Against Doing Business with Certain Offerors or Contractors.
- (ix) 10 U.S.C. 2397(a)(1), Reports by Employees or Former Employees of Defense Contractors.
- (x) 10 U.S.C. 2397b(f), Limits on Employment for Former DoD Officials.
- (xi) 10 U.S.C. 2397c, Defense Contractor Requirements Concerning Former DoD Officials.
- (xii) 10 U.S.C. 2408(a) Prohibition on Persons Convicted of Defense Related Felonies.
- (xiii) 10 U.S.C. 2410b, Contractor Inventory Accounting System Standards.
- (xiv) 10 U.S.C. 2501 note, Notification of Proposed Program Termination.
- (xv) 10 U.S.C. 2534, Miscellaneous Limitations on the Procurement of Goods Other Than United States Goods.
- (xvi) 10 U.S.C. 2631, Transportation of Supplies by Sea (except as provided in the clause at 252.247-7023, Transportation of Supplies by Sea).
- (xvii) Domestic Content Restrictions in the National Defense Appropriations Acts for Fiscal Years 1996 and Subsequent Years, unless the restriction specifically applies to commercial items. For the restriction that specifically applies to commercial ball or roller bearings as end items, see 225.7009-2(b) (Section 8064 of Public Law 106-259).
- (xvii) Section 8116 of the Defense Appropriations Act for Fiscal Year 2010 (Pub. L. 111-118) and similar sections in subsequent DoD appropriations acts.
- (b) Certain requirements of the following laws have been eliminated for subcontracts at any tier for the acquisition of commercial items or commercial components:

212.570

(i) 10 U.S.C. 2393(d), Subcontractor Reports Under Prohibition Against Doing Business with Certain Offerors (see FAR 52.209-6).

(ii) 10 U.S.C. 2402, Prohibition on Limiting Subcontractor Direct Sales to the United States (see FAR 3.503 and 52.203-6).

[60 FR 61595, Nov. 30, 1995, as amended at 61 FR 58488, Nov. 15, 1996; 62 FR 5780, Feb. 7, 1997; 65 FR 14401, Mar. 16, 2000; 65 FR 39704, June 27, 2000; 65 FR 77828, Dec. 13, 2000; 69 FR 63331, Nov. 1, 2004; 73 FR 76970, Dec. 18, 2008; 75 FR 27947, May 19, 2010; 76 FR 38048, June 29, 2011; 76 FR 58146, Sept. 20, 2011]

212.570 Applicability of certain laws to contracts and subcontracts for the acquisition of commercially available off-the-shelf items.

Paragraph (a)(1) of 10 U.S.C. 2533b, Requirement to buy strategic materials critical to national security from American sources, is not applicable to contracts and subcontracts for the acquisition of commercially available off-the-shelf items, except as provided at 225.7003-3(b)(2)(i).

[74 FR 37636, July 29, 2009]

Subpart 212.6—Streamlined Procedures for Evaluation and Solicitation for Commercial Items

212.602 Streamlined evaluation of offers.

(b)(i) For the acquisition of transportation and transportation-related services, also consider evaluating offers in accordance with the criteria at 247.206(1).

(ii) For the acquisition of transportation in supply contracts that will include a significant requirement for transportation of items outside the contiguous United States, also evaluate offers in accordance with the criterion at 247.301-71.

(iii) For the direct purchase of ocean transportation services, also evaluate offers in accordance with the criteria at 247.573-2(c).

[65 FR 50143, Aug. 17, 2000, as amended at 70 FR 35544, June 21, 2005; 72 FR 49205, Aug. 28, 2007]

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Subpart 212.70—Pilot Program for Transition to Follow-On Contracting After Use of Other Transaction Authority

SOURCE: 69 FR 63330, Nov. 1, 2004, unless otherwise noted.

212.7000 Scope.

This subpart establishes the pilot program authorized by Section 847 of the National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108-136).

212.7001 Definitions.

As used in this subpart—
Nontraditional defense contractor means a business unit that—

(1) Has entered into an other transaction agreement with DoD; and

(2) Has not, for a period of at least 1 year prior to the date of the other transaction agreement, entered into or performed on—

(i) Any contract that is subject to full coverage under the cost accounting standards described in FAR Part 30; or

(ii) Any other contract exceeding \$500,000 to carry out prototype projects or to perform basic, applied, or advanced research projects for a Federal agency that is subject to the FAR.

Other transaction means a transaction that—

(1) Is other than a contract, grant, or cooperative agreement;

(2) Is not subject to the FAR or its supplements; and

(3) Is entered into in accordance with 32 CFR part 3.

212.7002 Pilot program.

212.7002-1 Contracts under the program.

(a) The contracting officer may use FAR part 12 procedures to award a contract for an item or process that does not meet the definition of “commercial item,” if the contract—

(1) Is awarded to a nontraditional defense contractor;

(2) Is a follow-on contract for the production of an item or process begun as a prototype project under an other transaction agreement or as a research project carried out in accordance with 10 U.S.C. 2371;

- (3) Does not exceed \$50,000,000;
- (4) Is awarded on or before September 30, 2010; and
- (5) Is either—
 - (i) A firm-fixed-price contract; or
 - (ii) A fixed-price contract with economic price adjustment.
- (b) See 212.7003 for special procedures pertaining to technical data and computer software.

[69 FR 63330, Nov. 1, 2004, as amended at 71 FR 18669, Apr. 12, 2006; 73 FR 21845, Apr. 23, 2008; 74 FR 2416, Jan. 15, 2009]

212.7002-2 Subcontracts under the program.

(a) A subcontract for an item or process that does not meet the definition of “commercial item” may be treated as a subcontract for a commercial item, if the subcontract—

- (1) Is for the production of an item or process begun as a prototype project under an other transaction agreement or as a research project carried out in accordance with 10 U.S.C. 2371;
- (2) Does not exceed \$50,000,000;
- (3) Is awarded on or before September 30, 2010;
- (4) Is awarded to a nontraditional defense contractor; and
- (5) Is either—
 - (i) A firm-fixed-price subcontract; or
 - (ii) A fixed-price subcontract with economic price adjustment.
- (b) See 212.7003 for special procedures pertaining to technical data and computer software.

[71 FR 18669, Apr. 12, 2006, as amended at 73 FR 21845, Apr. 23, 2008; 74 FR 2416, Jan. 15, 2009]

212.7002-3 Thresholds.

The contract and subcontract thresholds at 212.7002-1(a)(3) and 212.7002-2(a)(2) include the dollar value of all options in accordance with section 826 of the National Defense Authorization Act for Fiscal Year 2011. See also FAR 1.108(c).

[76 FR 33171, June 8, 2011]

212.7003 Technical data and computer software.

For purposes of establishing delivery requirements and license rights for technical data under 227.7102 and for computer software under 227.7202, there

shall be a rebuttable presumption that items or processes acquired under a contract or subcontract awarded in accordance with 212.7002 were developed in part with Federal funds and in part at private expense (i.e., mixed funding).

(a) *Delivery requirements.* Acquire only the technical data and computer software that are necessary to satisfy agency needs. Follow the requirements at 227.7103-1 and 227.7103-2 for technical data, and 227.7203-1 and 227.7203-2 for computer software.

(b) *License rights.* Acquire only the license rights in technical data and computer software that are necessary to satisfy agency needs.

(1) For technical data, use the clauses at 252.227-7013, Rights in Technical Data—Noncommercial Items, and 252.227-7037, Validation of Restrictive Markings on Technical Data.

(2) For computer software, use the clauses at 252.227-7014, Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation, and 252.227-7019, Validation of Asserted Restrictions—Computer Software.

(3) Require the contractor to include the clauses prescribed by paragraphs (b)(1) and (2) of this section in subcontracts awarded in accordance with 212.7002-2.

(4) When the standard license rights for items or processes developed with mixed funding do not provide the minimum rights necessary to satisfy agency needs, negotiate for special license rights in accordance with 227.7103-5(d) and 227.7203-5(d).

[71 FR 18669, Apr. 12, 2006]

Subpart 212.71—Pilot Program for Acquisition of Military-Purpose Nondevelopmental Items

SOURCE: 76 FR 38049, June 29, 2011, unless otherwise noted.

212.7100 Scope.

This subpart establishes the pilot program authorized by section 866 of the National Defense Authorization Act for Fiscal Year 2011 (Pub. L. 111-383).

212.7101

212.7101 Definitions.

Military-purpose nondevelopmental item, nondevelopmental item, and non-traditional defense contractor, as used in this subpart, are defined in the provision at 252.212-7002.

212.7102 Pilot program.

212.7102-1 Contracts under the program.

The contracting officer may enter into contracts with nontraditional defense contractors for the acquisition of military-purpose nondevelopmental items. See PGI 212.7102 for file documentation requirements. Each contract entered into under the pilot program shall—

(a) Be awarded using competitive procedures;

(b) Be a firm-fixed-price contract, or a fixed-price contract with an economic price adjustment clause;

(c) Be in an amount not in excess of \$50 million;

(d) Provide—

(1) For the delivery of an initial lot of production quantities of completed items not later than nine months after the date of the award of such contract; and

(2) That failure to make delivery as provided for under paragraph (d)(1) may result in termination for cause; and

(e) Be—

(1) Exempt from the requirement to submit certified cost or pricing data;

(2) Exempt from the cost accounting standards under section 26 of the Office

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of Procurement Policy Act (41 U.S.C. 1502); and

(3) Subject to the requirement to provide data other than certified cost or pricing data for the purpose of price reasonableness determinations.

212.7102-2 Reporting requirements.

Departments and agencies shall prepare a consolidated annual report to provide information about contracts awarded under this pilot authority. The report shall be submitted to the Office of the Deputy Director, Defense Procurement and Acquisition Policy (Contract Policy and International Contracting), by October 31 each year in accordance with the procedures at PGI 212.7102. See PGI 212.7102 for annual reporting format.

212.7102-3 Sunset of the pilot authority.

(a) The authority to carry out the pilot program described in this subpart expires on January 6, 2016.

(b) The expiration under paragraph (a) of this section of the authority to carry out the pilot program will not affect the validity of any contract awarded under the pilot program before the expiration of the pilot program under that paragraph.

212.7103 Solicitation provision.

Use the provision at 252.212-7002, Pilot Program for Acquisition of Military-Purpose Nondevelopmental Items, in all solicitations that meet the applicability criteria of 212.7102-1 for this pilot program.